



Center for Elder Rights

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Guardianship and Conservatorship in Virginia

Guardianship & Conservatorship

Produced by
the Virginia Department for the Aging

in cooperation with

The Virginia Guardianship Association
&
**The Virginia Coalition for the
Prevention of Elder Abuse**

The information in this book is general in nature, and is offered to increase public knowledge and awareness about Guardianship & Conservatorship in Virginia. For specific advice, please consult a professional.

Introduction

Guardians and conservators are appointed to protect an **incapacitated person**, someone who cannot make decisions for himself or herself. Being “incapacitated” should not be confused with having bad judgment or being foolish.

Only a judge can decide that a person is incapacitated and appoint a guardian or a conservator for them.

A **guardian** can be totally in charge of the person's affairs, or the guardian's authority can be limited to making specific decisions. A guardian may be responsible for matters that most people take for granted, such as whether the person may attend a party or social gathering. Guardians may also be restricted in the types of decisions they may make, depending on the ability of the incapacitated adult to care for some of his or her own personal needs.

In contrast, a **conservator** is only responsible for managing a person's financial affairs.

Guardianship and conservatorship should be viewed as “last resorts”, to be considered only when no other options exist. This book will discuss some other tools you can use to help avoid guardianship or conservatorship.

Alternatives to Guardianship or Conservatorship

Sometimes, a person who might otherwise need a guardian or conservator can be served in a less restrictive way. The following are some alternatives:

- **Caregiver**

A caregiver is a person who takes care of another, often because the person cannot care for himself or herself. Caregivers are usually motivated either by feelings (love, sympathy, allegiance, etc.), or by financial incentives (pay, etc.). Courts do not appoint people to be caregivers for others.

Many people will never need to have a guardian or conservator appointed for them because they have family or other concerned individuals who will provide the care that they need. However, a caregiver lacks the legal authority to make legal or financial decisions for the person in his or her care.

- **Power-of-Attorney**

Having “power-of-attorney” allows one person (the “agent”) to make decisions or take action on behalf of another person. There are several types of powers-of-attorney, as follows:

A limited power-of-attorney gives the agent the authority to take a specific action on behalf of another person. For example, a limited power-of-attorney may allow one person to sell the other person's automobile.

A general power-of-attorney gives the agent the authority to take any action on behalf of the other person.

A durable power-of-attorney gives the agent the authority to act even if the other person becomes incapacitated. A durable power-of-attorney lets a person choose who will act as their agent if he or she cannot act. The person who is selected as the agent for a durable power-of-attorney must be someone who is totally trustworthy. Having a durable power-of-attorney may make the future appointment of a guardian or conservator unnecessary.

- **Advance Medical Directive**

An Advance Medical Directive selects an agent to make health care decisions when a person can not make his or her own decisions. An advance medical directive may include a “living will”. A living will is instructions about what health care decisions are wanted.

- **Representative Payee**

A representative payee is a person appointed to take care of another person's money.

Government benefits may be paid to a representative payee. The person appointed to be the representative payee will be responsible for paying the other person's living expenses.

The Social Security Administration must be contacted to have a representative payee appointed. If the person who needs to have a representative payee appointed for them is a veteran of the armed services, the Veterans Administration must also be contacted.

- **Trust**

A trust is an arrangement where one person or organization (the “trustee”) manages property for the benefit of another person (the “beneficiary”). A trust agreement states how the trustee is to act. Trusts may change a person's right to receive public benefits such as Social Security disability and Medicaid. A trust may also affect a person's taxes, so the advice of a lawyer should be sought when creating a trust.

Types of Guardianship

Once a judge has decided that a person needs to have a guardian appointed, the judge has some

flexibility in determining what type of guardian to appoint. The judge may also make specific rules for each guardian, to try to preserve as much of the person's independence as possible. There are several types of guardianship, as follows:

- **Emergency or Temporary Guardian**

A person may be appointed as a guardian for five days to handle an emergency. For example, if a person becomes ill and is delirious, the person will need for someone to arrange medical care. A guardian can be appointed to arrange for medical care until the person recovers the ability to make his or her own decisions.

An employee from the Department of Social Services must go to court and request that a guardian be appointed for the emergency. The guardian can then act, but only to correct the conditions causing the emergency. If necessary, the period of time for which the guardian was appointed can be extended.

- **Limited Guardian**

A limited guardianship is used where decisions are only needed for certain specific matters. For example, a person may be able to take care of his or her daily needs, but is unable to make decisions about health care. The judge then appoints a guardian to only make health care decisions, leaving the person free to make all other decisions.

- **Limited Conservator**

A limited conservatorship is used where decisions are only needed for certain specific financial matters. For example, a person is able to take care of his or her own daily needs, but is unable to make decisions about how the property from a trust is distributed. The judge will then appoint a conservator to only make decisions about the trust, leaving the person free to make all other decisions.

- **Standby Guardian**

A “standby guardian” is a person who will become the guardian of another person when the individual who is currently responsible for providing care dies. This type of guardianship is used to allow parents to plan for the care of a mentally impaired child after they are gone. A standby guardian does not assume any duties until the death of the last surviving parent.

Legal Terms Used In Guardianship Cases

- **Respondent**

The Respondent is the person for whom a guardian is sought. Respondents have the right to:

- Be represented by legal counsel;
- Be present at the hearing;
- Present evidence;
- Have witnesses present who can speak on their behalf; and
- Cross-examine all witnesses who provide evidence.

- **Petitioner**

The petitioner is the person who presents evidence to the court that a person is unable to take care of his or her affairs. The petitioner may be a concerned family member, an employee of a social service agency like Adult Protective Services, or anyone else who believes that a person needs a guardian or conservator. The relatives of the respondent are also notified about the hearing.

- **Guardian or Conservator**

A guardian or conservator is totally in charge of the person's affairs, unless the guardian's or conservator's authority is limited by the court's orders. The judge will consider the wishes of the respondent when deciding a guardianship case. A family member of the respondent is frequently appointed to be the respondent's guardian or conservator. In other instances, an attorney, a friend of the respondent, or a volunteer may be appointed.

- **Guardian Ad Litem**

After a petition has been filed with the court to appoint a guardian, but before the guardianship hearing takes place, the judge appoints a “guardian ad litem”. The guardian ad litem is an attorney who protects the rights of the respondent. He or she gathers information to present to the judge.

Before the court hearing, the guardian ad litem will visit the person for whom a guardianship is being sought. He or she will explain the court process, and tell the respondent about his or her rights during the hearing.

After collecting information and meeting with the respondent, the guardian ad litem will make a recommendation to the judge. Once the guardianship hearing is over, the guardian ad litem's job is completed.

- **Clerk of the Circuit Court**

Petitions for guardianship are filed with the Clerk of the Circuit Court. After a guardian or conservator is appointed by the judge, he or she must go to the Clerk of the Circuit Court to post the required bond and obtain a certificate of guardianship.

- **Commissioner of Accounts**

A Commissioner of Accounts receives and reviews financial reports from the conservator. The conservator must report on a regular basis about the incapacitated person's affairs.

- **Department of Social Services**

Each year, the guardian must file a report about the guardianship with the Department of Social Services.

Frequently Asked Questions

1. How do I know if a person needs a guardian or a conservator?

A **guardian** may be needed for a person who:

- Has a physical or mental problem that prevents him or her from caring for his or her own basic needs;
- Is in danger of substantial harm; and
- Has no family member or other person available to assume responsibility for them.

A **conservator** may be needed for a person who:

- Has a physical or mental problem that prevents him or her from managing his or her own financial affairs;
- Has no family member or other person available to assume these financial responsibilities; and
- Cannot be financially protected by use of other money management methods.

2. Who decides whether a person will have a guardian or conservator?

A judge decides whether a person needs a guardian or a conservator. Before deciding, the judge may ask for an evaluation of the person. The evaluation may include medical, psychiatric, psychological and social information. The judge will use the information in the evaluation to make his decision.

3. What are the duties of a conservator?

A conservator is responsible for identifying the person's property by taking an inventory. The conservator must file the inventory with the Commissioner of Accounts. After the inventory is recorded, the conservator takes charge of the management of the incapacitated person's property. The incapacitated person's money

must be kept separate and cannot be put into the conservator's own bank account. The conservator is authorized to make investments and other financial decisions for the incapacitated person. The conservator must also give an accounting of the incapacitated person's property to the Commissioner of Accounts on a regular basis.

4. What are the duties of the guardian?

The guardian makes decisions about how the person lives, including all matters about health, food, finances, residence and social activity. The guardian applies the values of the incapacitated person in making these decisions.

5. How can a guardianship be ended?

- The incapacitated person may petition the court to end the guardianship. If he or she is able to show an ability to care for and manage his or her own affairs, the judge will end the guardianship;
- The judge can appoint another person to be guardian;
- The guardian may petition the court to end the guardianship; or
- Anyone who believes that the guardian is not acting in the best interest of the incapacitated person may petition the court to end the guardianship, or to have another person appointed to be the guardian.

Publications

Additional information on guardianship is available in the following publications:

Guardianship & Conservatorship - A Handbook for Lawyers

Author: Scott K. Summers
American Bar Association Publishing
321 North Clark Street
Chicago, IL 60610-4714
Toll-Free: 1-800-285-2221
E-mail: orders@abanet.org
Web Site: www.abanet.org/abastore/index.cfm

Virginia Handbook for Guardians and Conservators

Virginia Guardianship Association
P.O. Box 9204
Richmond, VA 23227
Phone: (804) 261-4046

Senior Citizens Handbook - Laws & Programs Affecting Senior Citizens in VA

707 East Main Street, Suite 1500
Richmond, VA 23219
Toll-free: 1-800-552-7977 (Nationwide)
Local: (804) 775-0808
TTY: (804) 775-0502
Fax: (804) 775-0852
Web Site: www.vsb.org/publications/senior/index.html

Attorneys

If you would like help in selecting a lawyer, contact:

The Virginia Lawyer Referral Service

707 East Main Street, Suite 1500
Richmond, VA 23219
Toll-free: 1-800-552-7977 (Nationwide)
Local: (804) 775-0808
TTY: (804) 775-0502
Fax: (804) 775-0852
Web Site: www.vsb.org/vlrs.html

Additional Resources

Adult Protective Services is a part of the Virginia Department of Social Services (DSS). DSS helps senior citizens ages 60 and over; adults with disabilities age 18 and over; and other adults with specific needs. The Department works with local social services departments across the state and local service providers to offer assistance to:

- Elders needing protection from abuse;
- Elders needing services provided by adult care residences or adult living facilities; and
- Adults with disabilities needing help with care, transportation, and nutrition services.

The Department of Social Services also helps:

- Adults involved in domestic violence situations;
- Adults in need of financial assistance;
- Adults in need of energy assistance;
- Adults in need of food stamps; and
- Citizens who believe they may have been discriminated against by a social services agency.

If you or someone you know needs assistance, contact:

Virginia Department of Social Services
7 North Eighth Street
Richmond, VA 23219
Phone: (804) 726-7000
E-mail: citizen.services@dss.virginia.gov
Web Site: www.dss.virginia.gov

Toll-Free Numbers:

Adult Protective Services: 1-888-832-3858
Citizen Services: 1-800-552-3431
Statewide Human Services Information and Referral System: 1-800-230-6977

Area Agencies on Aging (AAAs) are located throughout the state. For information on services in your area that can help older persons, their families and caregivers, contact your local Area Agency on Aging. You can find their telephone number in your local telephone directory, or you can call the Center for Elder Rights at the Virginia Department for the Aging. Use the contact information shown below:

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